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DEPARTMENT OF PUBLIC SERVICE REGULATION
BEFORE THE PUBLIC SERVICE COMMISSION
OF THE STATE OF MONTANA

IN THE MATTER OF the Joint Application of NorthWestern Corporation and Babcock Brown Infrastructure Limited, BBI US Holdings Pty. Ltd., BBI US Holdings II Corp., and BBI Glacier Corp. For Approval of the Sale and Transfer of NorthWestern Corporation Pursuant To a Merger Agreement	UTILITY DIVISION DOCKET NO. D2006.6.82

RESPONSE BRIEF OF HEARTLAND CONSUMERS POWER DISTRICT AND SOUTH DAKOTA POWER COMPANY, INC.

Intervenors Heartland Consumers Power District and South Dakota Power Company Inc. [collectively, "Heartland/SDP"] submit the following as their brief in response to the Opening Brief ["Jt. App. Br."] filed herein by the applicants Northwestern Corporation d/b/a/ Northwestern Energy ["NWEC"] and Babcock and Brown Infrastructure Limited. ["B&B," and collectively with NWEC, "Joint Applicants"].

INTRODUCTION

From long before the day B&B surfaced as the entity chosen by the Board of Directors of NWEC to be its merger partner pursuant to the Board's so-called "Strategic Review" process, Heartland and SDP have been directly interested in the ownership and proper operation of NWEC. To that end, and among other things, this interest led Heartland and SDP to participate with other South Dakota entities and with Montana Public Power to seek to acquire NWEC. Despite being unsuccessful in that effort, Heartland/SDP remained -- and to this day remain -- interested and affected by the proposed merger. They accordingly have intervened and participated in proceedings

relating to the proposed merger before the FERC, the South Dakota Public Utilities Commission, and this Commission.[1]

Heartland/SDP believe that rigorous regulatory review and oversight of the proposed merger is essential to protect the public interest and the integrity of the public utility. Only a brief review of the recent history of NWEC is necessary to understand why. Accordingly, Heartland/SDP's paramount interest in participating in this and the other mentioned proceedings has been to advocate for a thorough and probing review of the proposed merger and to support the imposition of conditions found to be necessary to protect consumers and the integrity of the utility.

Because of their involvement in the regulatory processes in several jurisdictions, Heartland/SDP has become increasingly concerned with the fact that the Joint Applicants have sought to contest or limit regulatory oversight of the proposed merger at every turn. In Heartland/SDP's view, and among other things, this practice of seeking to evade or limit review raises concerns regarding Joint Applicants' reassurances about their intentions toward customers and regulators. Of more specific concern to Heartland/SDP was the fact that the Joint Applicants vigorously -- and unfortunately, successfully -- contested the jurisdiction of the SDPUC over any aspect of the proposed merger. *See* Declaratory Ruling Regarding Jurisdiction, *In the Matter of the Merger Between NorthWestern and BBI Glacier Corp.*, SDPUC Docket No. GE06-001 (Jan. 9, 2007).

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[1] Heartland/SDP's specific interests and general position in this proceeding were set out in their Joint Petition to Intervene (filed July 10, 2006) and Brief in Response to [Joint Applicants'] Objection to Intervention (filed July 27, 2006). That discussion will not be repeated here but instead incorporated by this reference.

Heartland and SDP had sought to support that jurisdiction to address the very same issues at stake in this proceeding. While Heartland/SDP believe the SDPUC decision with respect to its own jurisdiction was incorrect, the fact of the matter is that this proceeding, before this Commission, is now the only place where the many issues raised by the proposed merger can and will be addressed.[2] This Commission's decision is thus just as important to NWEC's South Dakota customers, and to the state of South Dakota, as it is to NWEC's Montana customers and the state of Montana.

ARGUMENT

In this brief Heartland/SDP intend to focus on one critically important aspect of this case: the power of the Montana Public Service Commission under Montana law to review the proposed merger and, on the basis of that review, to either withhold approval or impose conditions on any approval that are necessary to protect the public interest. Heartland/SDP actually only decided to provide this argument after it received the Joint Applicants' Opening Brief and became aware of the position that they had apparently determined to take with respect to this question. While that position is vaguely stated, it appears that the Joint Applicants contend either that: (a) the PSC "does not have the legal authority to approve or disapprove of the [merger]" ***at all*** (Op. Br. at 5); or (b) ***at most***, any such authority is limited to "reasonable assurances that [the merger] will not adversely impact the rates or the quality of service of the utility being acquired." *Id.*

[2] Heartland/SDP acknowledge that the FERC has entered an order approving the proposed merger. *See* Order Authorizing Merger, *NorthWestern Corporation*, FERC Docket No. EC06-127-000 (Oct. 25, 2006). However, the scope of the FERC's review was limited and did not address many of the issues of concern to consumers in Montana and South Dakota.

The Joint Applicants base the first of their arguments on a strawman. Since the Legislature determined to use a "certificate of authority" process to regulate entry into the business of motor carriers, the Joint Applicants imply that the lack of such a process here means that the Commission has no authority over who enters into the "public utility" business and how they do so. This implication that a "certificate system" is the exclusive mechanism by which to commence operation as a public utility is not only an incorrect reading of the case it is purportedly based on,[3] but it is beside the point. What is at issue here is not whether B&B must acquire a certificate prior to commencing operation as a "public utility," but rather what obligations and duties attach once it assumes that status.

Second, the Joint Applicants misstate the facts when they state that "the Commission recognized long ago that it actually lacks authority over transfers and sale of utilities." Jt. App. Br. at 6. Whatever can be taken from *In re Eastside Telephone Company*, 77 PUR 9 (New Series) 87 (Mont. 1948),[4] it is very clear that the Commission has for some time maintained that it possesses the authority over public utility change of control transactions. *See, e.g., In Re Pacific Power & Light Co.*, MPSC Docket No. 87.9.49, Order No. 5298a, ¶¶ 51-53, 96 PUR 4th 371 (1988); *In Re Joint Application for*

[3] *Great Northern Pub. Util. Co. v. Pub. Serv. Comm'n.*, 88 Mont. 180, 293 P. 294 (1930).
[4] The one sentence from *Eastside* quoted by the Joint Applicants is both taken out of context and blown out of proportion. The actual holding of *Eastside* was that the Commission ***did*** have authority over the abandonment of service by a public utility. That authority alone is more than sufficient to cover the situation at issue here where, in substance, one set of owners of NWEC seek to "abandon" that ownership in favor of another set of owners.

Approval of Sale of Montana Power Company to Northwestern, MPSC Docket No. d2001.1.5, Order no. 6353c, p. 16 (Jan. 31, 2002).[5]

The Joint Applicants' alternative argument – that the Commission's jurisdiction is premised on assuring that the post-merger utility will be able to provide "reasonably adequate service" at "just and reasonable rates" -- is on its face both correct and reassuring. But the "devil is in the details," and the subsequent description of how they see that power employed is what causes concern. First, what constitutes a "reasonable assurance" appears to be defined by the Joint Applicants largely in terms of self-reference. In other words, it appears to be based less on the public interest and more on what a "[r]ational purchaser" (Jt. App. Br. at 5) is willing to offer or accept -- but, apparently, no more.

And beyond that, the Joint Applicants suggest that "[s]ince no rate changes can occur . . . without Commission approval . . . reasonable assurances on rate impacts are not particularly difficult to identify or implement." Jt. App. Br. at 5. Although not entirely clear, the implication of this argument is that, at least with respect to rates, the Commission has little power to act in a prospective manner to prevent the need to raise rates at some later date due to financial, structural, governance, and operational decisions made today or otherwise embedded in the structure of the proposed merger.

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[5] The existence of these decisions at the time when the Montana legislature considered, and rejected, legislation explicitly addressing this subject (*see* Jt. App. Br. at 7, fn. 2) actually supports the contrary of what the Joint Applicants contend. Jt. App. Br. at 7. Rather than providing evidence that the Legislature's intent was that the Commission was ***not*** to have this authority, this longstanding interpretation suggests that the Legislature understood and was satisfied that the Commission ***did*** have this authority, and that additional legislation wasn't needed. *See e.g. United States v. Riverside Bayview Homes, Inc.*, 474 U.S. 121, 137 (1985).

For reasons Heartland/SDP will discuss below, each of these arguments lack merit

1. The Joint Applicants Are Precluded From Asserting Their Theory of "Fair-Weather Jurisdiction."

The overall position of the Joint Applicants with respect to the jurisdictional question in this proceeding appears to be that they will accept the benefits of PSC review and approval so long as it is on their terms, but that they apparently feel they have the right to contest that jurisdiction if things don't work out the way they had hoped. For a number of reasons, this theory of "fair-weather jurisdiction" is untenable.

First, NWEC should be precluded from raising this issue at all. This case is not the first time NWEC has been before the Commission seeking its blessing of a change-of-control transaction. In January of 2001, NWEC, along with Montana Power Company ["MPC"], filed a joint application with the Commission seeking the approval of the sale of MPC's Montana operations to NWEC. In that petition NWEC and MPC asked the Commission to "determine that Montana Power's utility operations, as a subsidiary or division of NorthWestern, will continue to be a fit, willing, and able provider of adequate service and facilities at just and reasonable rates." Joint Application at p. 1, MPSC Docket No. D2001.1.5 (Jan. 11, 2001). That case was ultimately settled, and in its Final Order approving the terms of the parties' settlement agreement, the Commission specifically entered the following conclusion of law:

> 5. The Commission has jurisdiction over and must approve any sale or transfer of utility assets and obligations in order to assure generally that utility customers will continue to have adequate service, that utility rates will not increase as a result of the sale or transfer, and the acquiring entity is fit, willing and able to assume the service responsibilities associated with owning utility facilities.

In the Matter of the Joint Application for Approval of the Sale of Montana Power Company to NorthWestern, MPSC Docket No. D2001.1.5, Order No. 6353c at p. 16 (Jan. 31, 2002). That conclusion of law was necessary to the Commission's decision approving the sale, and was not appealed by NWEC. It now stands as a legal determination binding, at least in a general fashion, on NWEC, and operates to preclude it from maintaining in this proceeding the broader jurisdictional claim discussed above. *See e.g. Grenz v. Fire & Casualty of Conn.*, 2001 MT 8, 304 Mont. 83, 87, 18 P.3d 994, 997 (discussing elements of *res judicata*); *Slater v. Central Plumbing & Heating Co.*, 1999 MT 257, 297 Mont. 7, 16, 993 P.2d 654, 660.

To the same end is the line of authority which provides that a person who invokes the jurisdiction of an administrative agency is subsequently estopped from challenging the same. A good example is a case which arose recently before the California Public Utilities Commission. ["CPUC"]. In *In the Matter of the Application of Southern California Edison, et. al*, 2002 Cal. PUC LEXIS 7 (Jan. 9, 2002); *aff'd PG&E Corp. v. Public Utilities Commission*, 118 Cal. App. 4th 1174, 2004 Cal. App. LEXIS 785 (Cal. App., 1st App. District, Fifth Div., 2004), the CPUC considered a claim by several utilities which had, when it was convenient for them, sought the CPUC's approval of certain corporate restructurings but later, when the conditions the CPUC had attached to that restructuring proved inconvenient, sought to be relieved from some of them on the grounds that the CPSC lacked the authority to impose them in the first place. The CPUC

rejected that contention on a number of grounds, but relevant here is the following discussion:

> An entity may not seek an agency's approval of a particular act, obtain that approval subject to certain requirements, accept the benefits that flow from it, and later challenge the agency's authority to enforce the requirements while at the same time retaining the benefits of the approval. As the United States Supreme Court has explained:
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> > The appellant cannot blow hot and cold and take now a position contrary to that taken in the proceedings it invoked to obtain the Commission's approval. If the appellant *then had taken the position it seeks now, the Commission might conceivably have refused its approval of the transfer*. The appellant accepted the transfer with the limitations contained in the certificate. The appellant now will not be heard to say it is entitled to receive more. . ..
>
> Without this rule, entities could regularly evade the requirement that they obtain agency approval before they engage in certain conduct. Knowing that the agency would not grant its approval except subject to certain conditions or requirements, an entity could acquiesce to the agency's authority to impose the requirements, or simply remain silent, and only later -- after having gained the agency's approval -- challenge the requirements themselves. If successful, such a challenge would get the entity exactly what it otherwise never could legally have received: agency approval free from the challenged requirements. Other courts have reached identical conclusions on similar facts, holding that once an entity accepts the benefits of an agency's authorization made subject to conditions, the entity may not later challenge the agency's jurisdiction to have imposed the conditions in the first place.[6]

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[6] As the holding companies did there, the Joint Applicants will likely contend that subject matter jurisdiction cannot be waived. On that point, the CPUC explained that:

> In their briefs, the holding companies insist that estoppel has no place here because, they assert, their claim is one of subject matter jurisdiction, and a party cannot ever be estopped from challenging subject matter jurisdiction. This argument lacks merit for three reasons. First, subject matter jurisdiction is jurisdiction over the *type* of case. Here, the Commission plainly had jurisdiction over the type of case: the formation of a holding company under sections 854 or 818 of the Public Utilities Code. Second, the parties once again have changed their position in their comments. As PG&E Corp. concedes in its comments on the proposed decision, for instance, what the holding companies are talking about really is jurisdiction over the *parties*. "Estoppel may operate to confer jurisdiction over the parties to a controversy...."

2002 Cal PUC LEXIS 7 at *23-*30 (internal citations omitted, emphasis in original); *see also Vogel v. Intercontinental Truck Body, Inc.*, 2006 MT 131, 332 Mont. 322, 137 P.3d 573 (discussing elements of judicial estoppel).

In making the above points Heartland/SDP are well aware that NWEC sought in the Bankruptcy Stipulation, and the Commission approved, a provision whereby NWE's jurisdictional position was in some manner preserved. *See* Jt. App. Br. at 7-8. However, all the Bankruptcy Stipulation and the Consent Order required is that NWEC ***notify*** the Commission 45-days before the closing of any qualifying sale or disposition. It did not require NWEC to seek the Commission's ***approval*** of that disposition. While it is clear the Bankruptcy Stipulation and Consent Order would have protected NWEC's ability to (as it did in South Dakota) seek a declaratory ruling as to the Commission's authority after having provided notice and being made aware the Commission intended to do more; it does not go so far as to protect NWEC when, as here, it voluntarily asked for this review and in the process sought to avail itself of the benefits of the Commission's review. Viewed in this fashion, the CPUC's discussion quoted above is very much on point.

At bottom, NWEC has lost the ability to make its broader claim that this ***type*** of transaction is entirely outside the Commission's purview. Rather, it is left with arguing whether any specific act or order of the Commission is "cognate and germane" (*see*

2002 Cal PUC LEXIS 7 at *30. Here, as discussed below, the Commission clearly has authority over the subject matter of this case: public utility regulation. As such, this same analysis applies here.

PG&E Corp, 118 Cal. App. 4th at 1198, 2004 Cal. App. LEXIS 785 at ***45) to the Commission's general authority, or that the Commission has otherwise acted in contravention of other applicable principles of administrative law. *See* M.C.A., § 2-4-704(2).

2. *The Commission possesses the necessary authority to condition or disapprove the proposed merger prospectively in furtherance of its general authority to supervise and regulate public utilities.*

As a general matter, administrative agencies in Montana "enjoy only those powers specifically conferred upon them by the legislature." *Bick v. Dept. of Justice*, (1986) 224 Mont. 455, 457, 730 P.2d 418, 420. Implicit on the Joint Petitioners' broader jurisdictional position is the notion that the lack of express language in Title 69 giving the Commission authority to review public utility sales and mergers means that such authority does not exist and that such transactions can occur free of Commission review and irrespective of their impact on the public utility function. Such an argument both misapprehends the statutory grant of authority to the PSC, as well as the scope of the PSC's necessary powers thereunder.

As to the former, Mont. Code Ann. § 69-3-102 could not be clearer: "The commission is hereby invested with ***full power of supervision, regulation, and control*** of . . . public utilities, subject to the provisions of this chapter. . . ." (Emphasis added). In furtherance of that power Mont. Code Ann. § 69-3-103(1) specifically provides that:

> ***In addition*** to the modes of procedure hereinafter described in particular cases and classes of cases, said commission shall have the power to prescribe rules of

> procedure ***and to do all things necessary and convenient in the exercise of the powers conferred by this chapter*** upon the commission. . . .[7]

(Emphasis added). These provisions vest the Commission with broad authority over public utilities and make clear that the subsequent enumeration of particular powers and procedures in Title 69 is not intended to be exclusive. If -- as is the case here -- the procedure which the Commission is implementing is "necessary and convenient" to its "full power of supervision, regulation, and control" over public utilities, there is little question that it is encompassed within this express statutory grant.

And even if there were questions regarding the scope of the Commission's express powers, the Montana Supreme Court has explained that an agency also possesses those implied powers which are "necessary for the effective exercise and discharge of the power and duties expressly conferred." *State ex. rel Dragstedt v. State Bd. of Ed.*, (1936) 103 Mont. 336, 338, 62 P.2d 330, 332. Recently, in *Bitterroot River Protection Ass'n. v. Bitterroot Conservation Dist.*, 2002 MT 66, 309 Mont. 207, 45 P.3d 24, the Montana Supreme Court addressed a similar question to that at issue here. There, the Montana Streambed Preservation Act had granted certain powers to local conservations districts to review and regulate projects within "any natural, perennial-flowing stream or river." 2002 MT 66, ¶11, 309 Mont. at 210, 45 P.3d at 27. However, the Act failed to expressly provide those districts with the power to determine in the first instance what constituted a "natural, perennial-flowing stream or river." 2002 MT 66, ¶11, 309 Mont. at 210, 45

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[7] *Montana Power Co. v. Pub. Serv. Comm'n.*, (1983) 206 Mont. 359, 379, 671 P.2d 604, 615 dealt only with the "no judicial powers" exception which follows the quoted language, and thus has little bearing on the question at issue here.

P.3d at 27. Rejecting a narrow, textualist interpretation of agency jurisdiction, the Supreme Court explained that agency powers extended to those powers and actions which are necessary to give effect to the agency's express grant of authority:

> Unlike the agencies in either *Bell* [*v. Dep't. of Licensing* (1979), 182 Mont. 21, 594 P.2d 331] or *Taylor* [*v. Taylor* (1995), 272 Mont. 899 P.2d 523], the BCD is not seeking to add requirements to those already in the code or contradict its provisions. Instead, the BCD is simply attempting to apply the legislature's articulated requirement of "natural, perennial-flowing stream." ***This is a necessary task that the code fails to assign to any specific entity.*** Neither *Bell* nor *Taylor* address this jurisdictional question.

2002 MT 66, ¶ 14, 309 Mont. at 210-211, 45 P.3d at 27 (emphasis added). The obvious implication from *BRPA* is that if the conservation district had found the involved water body to fall with the Act's definitions, it would then have the powers provided under the Act to regulate projects within its bed and banks.

Applying that same principle here, it is clear as a threshold matter the Commission has the power to investigate the proposed merger and make determinations whether it might have an impact on the emergent entity's ability to meet its public utility obligations and otherwise be consistent with the public interest. *See e.g.* Mont. Code Ann. §§ 69-3-102, 69-3-103, 69-3-106, and 69-3-110. If, as a result of that investigation the Commission is able to determine as a factual matter either that conditioning or outright disapproval is required in order to protect the public utility function, such action then clearly falls within the express grant of authority under Mont. Code Ann. §§ 69-3-102. While the Commission itself has already so held (*see e.g.* cases cited at p. 4-5, *infra*), several cases from other jurisdiction serve to support this point.

In *Atlantic Tele-Network, Co. v. The Pub. Serv. Comm'n of the Virgin Islands*, 841 F.2d 70, 73 (3d Cir. 1988) the Third Circuit Court of Appeals addressed the question whether the Virgin Islands Public Service Commission ["VIPSC"] had the authority to review and condition the sale of a public utility's stock. At the time the review proceeding was conducted and the conditioning order was entered, the laws of the Virgin Island did not contain a provision specifically granting the VIPSC the authority to review such a transaction.[8] In rejecting the utilities' argument that the lack of a specific statute addressing that point was fatal, the Court explained as follows:

> Although no statutory provision enacted before the May, 1987 amendment explicitly gives the PSC the power to regulate the sale of a utility's stock, this power must be inferred from the pre-amendment statutory scheme. The PSC is charged with the responsibility of seeing that a utility meets its statutory obligation to provide adequate facilities and service at reasonable rates. In order to fulfill this responsibility, the PSC must have the authority to require a utility to maintain the kind of financial stability that will enable it to continue providing adequate facilities and service at reasonable rates in the future. In particular, if a sale of a utility's stock is proposed on terms that the PSC concludes will deprive the utility of such financial stability, it must be able to act effectively or its statutory mandate will go unfulfilled.
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> In Vitelco's case, the PSC . . . found that under the terms of the sale of Vitelco's stock to ATN, Vitelco is required to engage in conduct that will jeopardize its ability to provide adequate facilities and service at reasonable rates in the future. Once the PSC made such a finding, it had broad remedial powers to compel Vitelco to conform to its statutory duty. Although the district court held that the sale of Vitelco's stock on the proposed terms would not directly and immediately affect rates and services, we do not believe the Virgin Islands legislature intended that the PSC would have to wait until disaster struck before taking remedial action.
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> ATN argues that the PSC's order attempts to regulate not Vitelco, but ATN and ITT, which are not public utilities. Although we agree that the PSC has no authority to regulate the conduct of ATN or ITT *per se*, we conclude that it clearly

[8] During the pendency of the case that law was amended to expressly state such a power, but for other reasons the case was decided under the pre-amendment law. 841 F.2d at 73.

> has the authority to regulate what they can extract from or impose upon Vitelco. If we were to accept ATN's position that the PSC has no authority with respect to the sale of Vitelco's stock, it would necessarily follow that the PSC is powerless to stop ATN from causing Vitelco to place securities in the market containing covenants with unreasonable restrictions on Vitelco's use of its assets. We conclude that the PSC's powers are not so constrained.

841 F.2d at 73.

To similar effect is the discussion of the Louisiana Supreme Court in *Bowie et. al. v. Louisiana Pub. Serv. Comm'n.*, 627 So. 2d 164, 166-67 (La. 1993) recognizing the connection between the ownership of a public utility and the discharge of the public utility function:

> In our opinion, a rule or regulation prohibiting the sale of all of the stock in a closely held corporate public utility without prior determination by the public service commission that the transfer of ownership will be consistent with the public interest is necessary to the proper performance of the agency's regulatory function. Even though the balance sheet of a corporation is not affected when the ownership of stock is transferred, in reality the transfer of ownership of a closely held corporation through a stock purchase presents significant possibilities of affecting the management , technical expertise, credit worthiness, and stability of the corporate utility. . . . [I]n at least twenty-two states where the public utilities commission are not vested with autonomous regulatory powers, the legislatures by law have granted the commissions the authority to regulate the transfers of public utilities' corporate stock. . . . In states where the authority to regulate public utility stock transfers has not been expressly granted, the implied power has been found in the statutes or constitution creating the commissions. *Re Pacific Power & Light Co.*, 96 P.U.R. 4th 371 (Mont. Pub. Serv. Comm'n. 1988). . . . In these jurisdictions it is well settled that whether the power to regulate is express or implied, the public utilities commission has the power to disallow the sale, lease, mortgage, encumbrance, or other transfer of the properties of public utilities until the commission determined that the purchaser is ready, willing and able to continue providing adequate service and that the transfer is in the public interest.

627 So. 2d at 166-67 (some internal citations omitted).[9]

[9]The Court in *Bowie* ultimately held that Louisiana Public Service Commission lacked authority over the subject sale of public utility stock because it had failed to articulate or apply written

Finally, in *PG&E Corp. v. Public Utilities Commission*, 118 Cal. App. 4th 1174, 2004 Cal. App. LEXIS 785 (Cal. App., 1st App., Fifth Div., 2004), the California Court of Appeals addressed the question whether the CPUC had authority to enforce certain conditions that had been imposed on several non-public utility holding companies in a prior CPUC proceeding where those holding companies had received approval to merge with certain public utilities. The CPUC based its claim of authority on both specific California statutes dealing with transaction review and on its more general regulatory authority over public utilities and the public utility function. In upholding this authority, the California Court of Appeals explained:

> The PUC contends the Legislature has conferred limited jurisdiction upon the PUC to impose and enforce the holding company conditions pursuant to sections 701, 818, 819, and 854 [of the California Public Utilities Code], in recognition of the risks to ratepayers when utilities change ownership or issue securities. Indeed, the PUC claims it would likely violate its public interest mandate by approving public utility applications to form holding companies without the ability to assert continuing jurisdiction to enforce the holding company conditions. Section 701 is of particular relevance because it allows the PUC to "do all things necessary . . . and convenient" in the exercise of its authority over public utilities whether or not "specifically designated" in the Public Utilities Code. Where the authority sought is "cognate and germane" to utility regulation, the PUC's authority under section 701 has been liberally construed. The holding companies correctly point out that section 701 has never been read to expand the scope of the PUC's jurisdiction beyond public utilities. . . .. However, contrary to the holding companies' contentions, nothing in section 701 or elsewhere limits that statute's reach to public utilities. Although the statute initially refers to the PUC's power to "supervise and regulate every public utility," the PUC's authority to do all things "necessary and convenient" in the exercise of that power is not limited to actions against public utilities.

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standards, regulations, or precedents in judging the involved transaction. 627 So. 2d at 167-169. However, so long as the Commission here bases its decision on the criteria set out in its written precedents and in the Statement of Factors (of which the Joint Applicant are and were well aware), that issue would not be present here.

PG&E Corp., 118 Cal. App. 4th at 1198, 2004 Cal. App LEXIS 785 at ***44 - *** 45.

What is of specific note here in respect to the analysis from *PG&E* quoted above is the similar construction of Section 701 of the California Public Utilities Code (Cal. Pub. Util. Code § 701) and Mont. Code Ann. § 69-3-103(1). Both follow or are part of a general grant of authority over public utilities, and both expressly empower the utility commission to do all things "necessary and convenient" to that end. And while it is stated in a different ways in each statute, each also makes clear that the specific powers and procedures set out elsewhere in the utilities code are not exclusive. Section 701 states that the CPUC's implied powers exist whether or not "specifically designated," and it is that language that is the basis for the California courts' liberal interpretation of the CPUC's powers under California law.

While it uses different terminology, Mont. Code Ann. § 69-3-103(1) is structured in much the same way. It specifically provides that the "necessary and convenient" powers are ***"[i]n addition"*** to those specifically set out in the remainder of Title 69. If the remainder of Title 69 was intended by the Legislature to be exclusive, then the "in addition" language in § 69-3-103(1) would be surplusage. It is not, and as is the case in California under the Section 701, the Commission's implied powers under Mont. Code Ann. § 69-3-103(1) should be liberally construed to allow the Commission here to take such actions, specifically including disapproval or the imposition of appropriate conditions, as are necessary to protect the public interest and the public utility function.

CONCLUSION

The Joint Applicants' arguments regarding the supposed lack of Commission authority should be disregarded and the Commission should not hesitate to enter such orders either disallowing or conditioning the proposed merger as are necessary to protect the public interest and the public utility function.

DATED this 7th day of May, 2007.

LUXAN & MURFITT, PLLP

Harley R. Harris, Attorneys for
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CERTIFICATE OF SERVICE

I, Harley R. Harris, certify that on the 7th day of May 2007, a true and accurate copy of the foregoing **RESPONSE BRIEF OF HEARTLAND CONSUMERS POWER DISTRICT AND SOUTH DAKOTA POWER** was duly served upon the parties listed below by depositing the same, postage prepaid in the United State mail to:

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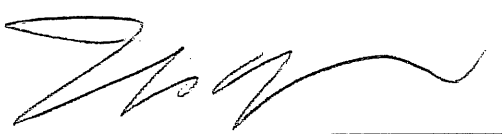

Harley R. Harris